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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EMETERIO TICAR BETIWAN, Defendant and Appellant.	A151420 (Contra Costa County Super. Ct. No. 05-160669-8)

Defendant Emeterio Ticar Betiwan was convicted following a jury trial of rape of an incompetent person, committing a lewd act on a dependent adult, and elder abuse. On appeal, he contends that after a juror was missing without leave for a trial day the court erred in conducting only a limited inquiry into the juror's absence. He also claims the trial court erred in admitting hearsay statements from investigators recounting the victim's description of the charged offenses. The evidence was admitted to establish the victim's capacity to consent, and the trial court concluded its probative value outweighed any prejudicial effect. Finding no error, we affirm the judgment below.

PROCEDURAL HISTORY

The People filed an information charging defendant with rape of an incompetent person (Pen. Code, § 261, subd. (a)(1), count 1), committing a lewd act on a dependent adult (Pen. Code, § 288, subd. (c)(2), count 2), and elder abuse (Pen. Code, § 368, subd. (b)(1), count 3). A jury trial commenced on January 30, 2017.

TRIAL PROCEEDINGS

I. The Prosecution's Case

A. Jane Doe's Dementia

Victim Jane Doe was 84 years old at the time of trial. Her son T.S. testified that he hired a caregiving service to help his mother with driving, errands, shopping, cooking, and taking her medications after she began to suffer memory loss and show signs of disorientation. In July 2015, he decided to place her in an assisted living facility because she needed more care than he could provide. By this time, she was not capable of taking a bus or doing any shopping on her own.

Dr. Christopher Simmons testified at trial that he had been Doe's primary care physician for eight years. He completed the forms for Doe's admission to residential care in 2015 and listed her diagnosis as Alzheimer's disease/dementia with a secondary diagnosis of depressive disorder. Dr. Simmons testified that Doe was confused and disoriented but could follow directions and express her basic needs. By February 2016, Doe had the level of cognition and understanding of an eight-year-old child, in terms of her ability to care for herself as well as her insight and judgment.

Doe's neurologist, Dr. Brad Volpi, started treating Doe in March 2012. He described Alzheimer's as a progressive disease. It is the most common form of dementia, which is defined as a loss of cognitive capacity affecting memory, the ability to make decisions, to find one's way, to speak, and to understand. It can also affect one's judgment. Dr. Volpi diagnosed her with Alzheimer's disease in January 2013, based on cognitive assessment testing. In April 2015, he characterized her level of Alzheimer's disease as "mild." Five weeks later, however, she had declined to a level that would be considered moderate to severe dementia. Her diagnosis remained stable through May 2016.

Dr. Volpi concurred with the family's decision to institutionalize Doe for her own safety. By July 2015, she was not able to prepare her meals, would fall when left by herself, and was in danger of leaving the stove on. She was no longer competent to make decisions regarding her safety. She was very childlike in terms of her judgment,

demonstrating the emotional maturity of a five-year-old. By February 2016, Doe exhibited impairment in a number of different areas besides memory. While she was alert and cheerful, her conversations were superficial and did not have meaningful content.

Doe first moved to a residential facility in Moraga. Because Doe would wander from the facility and did not understand that she could not leave the facility on her own, the executive director recommended that she be moved to a locked facility.

B. Doe Moves to Diablo Assisted Living

In July 2015, T.S. moved Doe to a licensed dementia care facility called Diablo Assisted Living in Walnut Creek (Facility). The Facility is owned by Jill Bragg, and is a large house with attractive grounds. Bragg lives at the Facility with her husband and two sons. Six elderly residents and several caregivers also live there. The caregivers work on two shifts, the day shift and the night shift.

Bragg installed alarms on every door, and put special handles on the gates so that Doe could not open them. Doe needed verbal assistance on how to brush her teeth and comb her hair and how to use the toilet. She also needed assistance with showering, bathing, and putting on her clothes. Doe would participate in activities but did not initiate them. She was prescribed medications but did not have the ability to remember to take them on her own and did not know what pills she was taking. She took medication in the morning and was prescribed Trazodone for sleeping at night.

Bragg hired defendant in December 2015 to work the night shift two days a week. During the interview, defendant relayed his long history of employment in the caregiving field. Bragg does state-mandated training for new employees, including medication training, CPR, first aid, dementia training, and caregiver training. She also has a senior employee shadow her new employees so that they can learn each resident's needs.[1]

[1] Salvador Magat testified he has been a caregiver at the Facility for 10 years and works the night shift. He trained defendant for two nights when defendant was hired. Magat told defendant that the residents had dementia and that he should be careful to administer their medications on time.

Defendant was advised that he was a mandatory reporter for any type of abuse. During his employment, four of the six patients had dementia and all but Doe were in diapers. Defendant's only responsibility for Doe was to administer her nighttime medication. Bragg specifically recalled telling defendant that Doe had dementia.

Bragg stated that by February 2016, Doe's condition had not improved. Doe was able to make some of her own decisions, and she was often alert, chatty, and very pleasant to be around. She was able to express whether she liked something or not. However, she could not remember the name of Bragg's dog that she played with every day. She would sometimes try to use the garbage can or her clothing hamper as a toilet, put her underpants on her head, and wear clothing in unintended ways. She was very childlike, often playing with Barbie dolls and picking flowers with an employee's two-year-old child. In the kitchen, she could peel vegetables but could not figure out how to take the paper wrap off sticks of butter. She was more debilitated at night, a phenomenon known as "sundowning," when she could become more anxious and engage in repetitive behavior. Bragg never saw Doe hug any of her employees or exhibit any sexual behavior.[2]

Jocelyn Delacruz, a day-shift caregiver at the Facility, testified that she would assist Doe in brushing her teeth, giving her a shower, and selecting her clothing. Doe was forgetful and would get lost trying to find her room. Delacruz never saw Doe hugging or embracing caregivers, and never saw her do anything sexual.

C. The Offense

On the night of February 8, 2016, Bragg left the Facility to go for a swim, leaving defendant in charge of the residents. The following morning, Doe told Delacruz that the

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[2] Bragg testified that following a visit with Dr. Simmons, Doe said that her breasts would get really big when she would see him, and that sometimes he "just makes my heartbeat flutter." Doe had never directly expressed anything of a sexual nature to Dr. Simmons. Dr. Simmons testified that he had no clue as to what her comments to Bragg meant, and did not think that it meant anything given her level of cognition. People with dementia typically lose their social appropriateness because they "have no filter," and their statements do not reflect their true beliefs.

person who administered medications had inserted his penis into her sexual organ. Doe repeatedly stated the allegations and appeared fearful. Delacruz told Bragg what Doe had said. Bragg asked defendant to return so she could talk with him. As they spoke, he looked very remorseful. He started to cry and put his hands to his head. She told him she was calling the police and he did not try to leave.

Deputy Brian McMillen testified that he was dispatched regarding a possible sexual assault on February 9, 2016. McMillen spoke to defendant. After he told defendant that he was not under arrest, defendant spontaneously said that he felt he should be arrested because the victim was his client. He said the previous night he gave Doe her medication and she approached him and gave him a hug, telling him something to the effect that he was a nice guy. As he was leaving the room, he turned around and saw that she was not wearing any clothing below the waist. He then took his pants off and had sexual intercourse with Doe on her bed for about three minutes. He did not deny knowing that Doe had dementia. Defendant was arrested.

Doe was driven to a hospital by her son T.S., where she was administered a sexual assault medical examination. She seemed shaky and did not have her normal happy demeanor. Subsequent testing showed the DNA taken from Doe's rape kit matched defendant's DNA. In the two years prior to the assault, Doe had never said she was interested in sex and T.S. never saw her act out sexually in any way. She did not make inappropriate sexual comments and did not hug strangers.

A week before trial, T.S. went to the district attorney's office to watch a "day in the life" video of his mother at the Facility. In the video, investigators toured the Facility with her. The video was played for the jury. According to T.S., in February 2016 Doe would not have been able to tell someone what she had for breakfast, explain her artwork, talk about why she was at the Facility, or know who the president of the United States was. She would not recall what activities she liked or what she had done that morning. She also could not find the kitchen, the garden, or the front door without wandering around. On cross-examination, T.S. agreed that while his mother has a lot of trouble remembering details, she was pretty good with small talk and personal interactions.

D. Doe's Hearsay Statements

Deputy Jimmy Salguero was dispatched to the Facility along with Deputy McMillen. Salguero interviewed Bragg and then Doe. Doe had a happy demeanor. She appeared as if nothing was wrong. He asked her a few questions to get an idea of her mental abilities. She did not know the date, the day of the week, or who the president was. She did tell him her name and her date of birth. She first stated that she could not remember when, but during the night she had been dancing.

At this point, the trial court gave the jury the following admonition: "You may not consider any of [Doe's] statements for the truth of the matter or how she actually felt or if she felt sexual desire. You may consider these statements to evaluate her capacity to consent to sexual activity. Whether she actually consented or not is not the issue in this case. You may use those statements introduced as evidence of how she is able to communicate with others, for example, her vocabulary, her ability or inability to describe events, the progression of her dementia, her understanding of the event, her understanding of the sex act, the nature and consequences of a sex act."

Doe told Salguero that during the night she was talking to the man who gives her pills. He was naked and he showed her his penis and he entered into her vagina. She stated the man used her sexually. She told the "pill man" multiple times to stop and he did not. Salguero did not attempt to clarify her statements due to her condition. She did not specifically use the words "penis" and "vagina," but he understood that she was talking about them and describing having sex.[3]

Detective Emily Amott interviewed Doe in Doe's room on February 10, 2016. Amott testified as to her special training on how to interview vulnerable victims. After the trial court gave the same hearsay admonishment as before, a recording of the interview was played to the jury. During the interview, Doe said she has Alzheimer's

[3] The jury also heard Bragg testify that Doe told her "a man had came [*sic*] to her that night and pulled all of her [*sic*] stuff out and put it inside her, and she was afraid that she might be pregnant, and she pointed to her groin area." At this point, the trial court again admonished the jury as to how to consider Doe's hearsay statements.

and has trouble remembering things. She described defendant as "just a nice man" who is "one of the people who, you know, goes around and gives, uh, like pills or something . . . [¶] . . . [¶] . . . to people at night." She then reported that he "put his—all his things in his body . . . [¶] . . . [¶] . . . in to my—into mine," describing this event as "kind of, scary." She did not remember what it is called, but said "his things" were between his legs and looked like what "a man without clothes on would have." When asked what it felt like, she said it felt like "someone just invading me." She also said she was "not one who's had a lot of, uh, sexual, uh—uh, attractions and all that," and that "when he came into me it was just—it was shocked." When asked what made him stop, she said, "Uh, I don't know. I might've walked away or something."

Jennifer Milne is a sexual assault forensic examiner who conducted Doe's sexual assault medical examination. Prior to testifying as to what Doe told her, the trial court read the same hearsay admonition. Doe reportedly said, " 'There is a young man that comes in, about in his 30's; very friendly and handsome. [¶] He used to come deliver meds, but he doesn't really work there.' " Doe also said, " 'Well, we were dancing together, with no one else in the room. I don't remember which room we were in.' " With respect to the sex act, Doe stated to Milne: " 'He opened his pants and pulled out his parts, and then he started getting into me; you know, like in my parts. [¶] . . . [¶] I was just standing there, and he was bringing his parts to me. He entered my area. [¶] . . .[¶] He puts his parts into me without asking. It was a big shock to me 'cuz someone has never done that before. [¶] . . . [¶] I just went to bed after. I told him I was going to bed. [¶] . . . [¶] I don't know what he does. He gives them stuff while they are sleeping.' " She also said, " 'I think he lightly kissed me on my neck.' "

The Missing Juror

On February 28, 2017, the first of the two alternate jurors was excused. The second alternate juror was excused on March 2, 2017. During the morning of March 2, 2017, the trial court commented that Juror No. 106 was absent, "which is very odd." The juror reappeared in court the following Monday, and the trial proceeded with defendant's case. The missing juror incident is discussed further below.

II. Defendant's Case

Detective Amott testified that she interviewed Bragg about the incident on February 10, 2016. A portion of the recorded interview was played for the jury.

Delacruz testified that Bragg had asked her to translate in Tagalog a conversation between Bragg and defendant on the day the incident was first reported by Doe. In that conversation, defendant admitted right away that he had sex with Doe and that it was a big mistake and he would accept whatever punishment for his conduct.

Dr. Robert Bender testified as an expert in geriatrics. He had never met or treated Doe. He explained the progression of Alzheimer's disease, including which parts of the brain are affected over the course of the illness. Alzheimer's has the potential to affect a person's insight and judgment, but the affect varies widely between individuals. Dr. Bender did not think that comparing the cognitive abilities of Alzheimer patients to the abilities of children was a good analogy because their brains are different. In particular, the limbic system of the adult brain contains the life experiences and the sense of self. These adults have instincts or reactions based on events that a younger person has not yet experienced. Alzheimer patients can also differentiate right from wrong.

Dr. Bender stated that people with moderate to severe Alzheimer's disease can still have sex. Patients can still feel sexual attraction because the part of the brain that drives human sexuality is not affected in Alzheimer's disease, if at all, until very late in the course of the illness. Hypothetically, the fact that a patient makes a comment suggesting she felt a sexual attraction towards her physician suggests that the individual has insight into her own brain activity, indicating a higher level of cognition.

Patients also retain social skills into the advanced stages of dementia. They are often able to carry on conversations, masking their underlying cognitive difficulties with superficial social interactions. This ability may cause them to seem less impaired than they really are. In reviewing interviews with Doe, Dr. Bender noticed that she was engaging in superficial socialization because she had some insight into her condition and was very friendly with the interviewer. On video, she was attentive to the other person with her and appeared well-groomed and appropriately dressed.

III. Jury Verdict

The case went to the jury on the afternoon of March 8, 2017. The following morning, the jury returned their verdict, finding defendant guilty on all counts. Defendant was sentenced to the upper term of eight years on count 1, with counts 2 and 3 stayed pursuant to Penal Code section 654. This appeal followed.

DISCUSSION

I. Juror Misconduct Does Not Require Reversal

Defendant contends the trial court erred by failing to conduct an adequate hearing into the circumstances of Juror No. 106's absence from court. He claims the error amounts to a denial of his federal and state constitutional rights to a fair trial and to due process of law. We are not persuaded.

A. Proceedings Below

On Thursday, March 2, 2017, following the unexplained absence of Juror No. 106, the trial court stated: "So we have left multiple messages for (Juror No. 106), and we have not received a response back. [¶] . . . [¶] We have left multiple messages on his cell phone and have not received a response yet, so we will continue to wait." Later, the judge stated that the clerk "just spoke with our juror's husband, who said when he got up this morning, the juror was gone, but he had been not feeling well the night before, does not know if he went to the doctor's office and is going to try and reach him. [¶] But it's sort of unusual that we haven't heard back, and he is unaware of where his husband is, so let's just wait and see what happens." The court was unable to reach Juror No. 106 by the afternoon session, and the jury was excused until the following Monday.

On Friday, March 3, 2017, the trial court and the attorneys reviewed jury instructions. The court observed: "We have another call in to our missing juror, both to he and his husband, and we left messages this morning since no one picked up, so maybe we will hear something back." Later, the court stated: "Let's—before we run out of time this morning, let's talk about our juror situation. If we get ahold of this juror, and he comes in, then we are fine. If we get ahold of this juror and, for whatever reason, he can't or won't come in, we are not fine. And if we never get ahold of this juror, then we

are not fine." Defense counsel indicated that if the juror did not come back, he would be inclined to request a mistrial and not stipulate to try the case to 11 jurors. The court said it would have the clerk call again and leave a message that the juror was expected to report at 9:00 a.m. on Monday.

On Monday, March 6, 2017, Juror No. 106 was present for the morning session. The following exchange occurred:

"THE COURT: "Welcome back.

"JUROR NO. 106: Thank you.

"THE COURT: "All right. I just wanted to—go ahead and have a seat. I just wanted to touch base with you and make sure that everything is okay.

"JUROR NO. 106: Everything is great.

"THE COURT: Yeah?

"JUROR NO. 106: Yeah. Everything is fine.

"THE COURT: Okay.

"JUROR NO. 106: Just—

"[DEFENSE COUNSEL]: "I'm sorry to interrupt. We don't have the interpreter quite yet."

"THE COURT: Okay. Hold on. Let's make sure that's hooked up.

"JUROR NO. 106: Sure."

After a brief pause, the discussion resumed as follows:

"THE COURT: . . . We will start from the top. You are back. Welcome back.

"JUROR NO. 106: Thank you. I do apologize—

"THE COURT: "Okay.

"JUROR NO. 106: —for not calling, but everything is fine now, and I should be 'A' okay.

"THE COURT: You are good to go?

"JUROR NO. 106: Absolutely.

"THE COURT: Okay.

"JUROR NO. 106: "Yes.

"THE COURT: "Okay. All right. Nothing having to do with the case?

"JUROR NO. 106: No.

"THE COURT: Okay.

"JUROR NO. 106: No. I'm okay.

"THE COURT: Thank you very much.

"JUROR NO. 106: Thank you.

"THE COURT: All right. Let's bring our jurors in, and let's get started."

At this point, defendant's counsel did not raise any objection regarding the juror's explanation. The prosecutor reported that the juror was "wondering if he should stay or go."

"THE COURT: You are fine.

"JUROR NO. 106: Okay.

"THE COURT: You are good. I am not letting you out of my sight."

During a break, defense counsel went on record to review the situation with Juror No. 106. The trial court clarified that staff had contacted the juror's spouse, who indicated that the juror had suffered a migraine the night before he failed to appear. They had no further communication until the juror called back on Friday afternoon. He said he would report Monday morning and he wanted to talk to the judge at that time. Before the juror arrived, he called again that morning and asked to be excused.

The trial judge reported that when they were on the record, "I specifically asked him, because I didn't think it was necessary to get into detail, unless it had to do with this case, and I asked him specifically whether or not his absence had to do with this case, and whether he was okay. [¶] He said—well, you heard him. It's on the record, that he was fine, and that it had nothing to do with the case. So I didn't proceed any further, and I didn't get an indication from counsel that you wanted anything more from him." Defense counsel responded that he was aware that the court did not want to probe into the juror's personal issues, but that he had thought the inquiry "would at least find out the general nature of his concern, or his reasons for being AWOL, or the reason that he was saying this morning, I want to be excused, and we don't have that information. [¶] So I do still

have some concerns that there may be a reason this juror can no longer be fair and impartial, but now he is sitting as our juror and that we don't know that—we don't have that information . . . ." Counsel then moved for a mistrial, which was denied.

B. Relevant Authority

" 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) Such decisions are reviewed " 'for "abuse of discretion" . . . . If there is any substantial evidence supporting the trial court's ruling, we will uphold it.' " (*Id.* at p. 474.) The trial court's decision will be upheld "unless it ' "falls outside the bounds of reason." ' " (*People v. Earp* (1999) 20 Cal.4th 826, 892.) Furthermore, we must " 'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 1049.)

A hearing regarding a juror's alleged misconduct " 'is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case.' " (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478.) "The specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion." (*People v. Seaton* (2001) 26 Cal.4th 598, 676.) " 'The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred.' " (*People v. Avila* (2006) 38 Cal.4th 491, 604.)

The trial court acted promptly to conduct a hearing upon Juror No. 106's return to court. The judge spoke to both counsel in chambers regarding the potential misconduct issue, and questioned the juror before the trial was resumed. When the questioning suggested that no prejudicial misconduct had occurred, and the absence was unrelated to the case, the court elected not to conduct any further inquiry. Based on the information relayed by the juror's husband, it appeared the juror had suffered a transitory medical

problem. There was no showing of potential prejudice and defendant's counsel did not raise an immediate objection or note any concerns.[4]

Defendant asserts the court should have directly asked Juror No. 106, " 'Why were you absent?' " While he speculates the juror "did not want to fulfill his obligation to be a fair and impartial juror," the juror did not convey anything of the sort. The juror responded to the court's questions and affirmed that he was "absolutely" good to go and his absence had nothing to do with the case. Our review on appeal necessarily relies on the trial court's assessment of a juror's demeanor and responses to its inquiries. The record provides no indication that Juror No. 106 committed prejudicial misconduct or was incapable of performing his duties. The court would be obligated to conduct a further inquiry if "the defense [had come] forward with evidence that demonstrate[d] 'a strong possibility' of prejudicial misconduct." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) No such evidence was brought forth and the court was under no obligation to inquire further.

The California Supreme Court has stated " 'that a juror's inability to perform as a juror " 'must appear in the record as a demonstrable reality.' " ' " (*People v. Cleveland, supra,* 25 Cal.4th at p. 474, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 843.) Discharging a juror where the record does not establish such a demonstrable reality would constitute an abuse of discretion. (*People v. Cleveland*, at pp. 485–486.) While defendant asserts that in the absence of direct questioning, the presumption of prejudice "cannot be rebutted," there is nothing to support his claim that the juror manifested a bias against him. We conclude the trial court did not abuse its discretion in the manner in which it inquired into the juror's absence.

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[4] For the reasons we discuss, defense counsel's performance during and after the inquiry was neither objectively deficient nor prejudicial as required to sustain an ineffective assistance claim. (See, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Weaver* (2001) 26 Cal.4th 876, 925–926.)

II. Admissibility of Doe's Statements

Defendant complains that the trial court erred by admitting Doe's statements to caregivers and investigators. His chief contention is that the statements were more prejudicial than probative, requiring reversal of judgment. Specifically, he asserts "[t]he repeated revelation by Doe that she been [*sic*] forcibly raped by appellant made it impossible for the jury to limit its consideration of the evidence as instructed by the court." Defendant also argues in passing that admission of Doe's statements violated his constitutional right to confront his accuser.

A. Proceedings Below

In a pretrial motion, the prosecution sought admission of Doe's statements about the incident through witness testimony from caregivers and investigators, offered for the nonhearsay purpose of demonstrating Doe's limited cognitive functioning.[5] Defense counsel opposed, arguing the statements were testimonial hearsay, untrustworthy, and more prejudicial than probative. The trial court agreed that most if not all of Doe's statements were "clearly prejudicial," but concluded the probative value of the statements outweighed the prejudice:

"[T]his jury is going to have a tough job to evaluate the mental capacity of an individual, and they are going to have to make that evaluation based on very limited information. They won't have any past history of watching this individual or seeing the slow or rapid decline in cognitive function. They will be presented with pieces of

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[5] Defendant's charge of rape of an incompetent person (count 1) is defined as "an act of sexual intercourse accomplished . . . under any of the following circumstances: [¶] (1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. . . . [T]he prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent." (Pen. Code, § 261, subd. (a).) For purposes of Penal Code section 261, subdivision (a)(1), a person is legally incapable of consenting to intercourse when a mental disorder or developmental or physical disability renders him or her " 'unable to understand the act, its nature, and possible consequences.' " (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1416; see CALCRIM No. 1004.)

information about interactions other people have had with her. [¶] . . . [¶] . . . I think that the probative value of all the statements, and taken together, I think that there is more value and as much information as possible go into this jury so that they can make an intelligent evaluation of that core element of capacity. And I think that information is extremely probative of where this woman is on the spectrum of dementia. [¶] . . . [¶] So I appreciate the concern, but I honestly think that the probative value outweighs the prejudicial value because of the nature of the element that has to be proven . . . ."

After defense counsel moved for reconsideration of the trial court's ruling, the court agreed to excise certain statements that appeared inflammatory and were not probative of Doe's capacity to understand the nature of the act. The court excluded Doe's statements that the sex act happened four times and that defendant had pushed her down on the bed. It reaffirmed its ruling admitting Doe's other statements, explaining: "[H]ow [Doe] describes [the incident] is critical here, because that goes to her cognitive function and her level of understanding, both of what happened and the consequences of it [and] to excise that out is to take probably some of the best evidence of where she is at cognitively out of the equation and out of the fact-finders' hands." The court added that a properly worded admonishment could address the defense's concerns and invited the parties to propose language for the admonishment. The court reiterated "my basic ruling is that how [Doe] describes these things in close proximity to the events is extremely probative of what she understands, what she doesn't understand, and that is the core of the element—those elements in Count 1."

Doe's statements regarding the incident were introduced at trial through witnesses Delacruz, Bragg, Salguero, and Amott. Delacruz testified that Doe told her, in part, that defendant had stuck his penis inside of her "sexual organ," causing her pain. Doe told Bragg that a man had pulled his "stuff" out and put it inside of her, and she was afraid she might be pregnant. Salguero testified that Doe told him defendant had shoved his penis into her vagina despite her repeatedly telling him to stop. The jury also heard the audio recording of Amott's February 10, 2016 interview, wherein Doe stated that she felt invaded during sex with defendant. In each instance, the jury was admonished not to

consider Doe's statements for their truth, but for the way she expressed herself and related events, and to evaluate her capacity to consent and her understanding of the nature and consequences of a sex act.

After Amott testified regarding Doe's audiotaped interview, defendant's counsel reiterated an objection. In response, the trial court stated, in part: "One of the things that I thought was of particular importance for the jury is how [Doe] is able to communicate; an example of her vocabulary, her inability to describe an event. And I think this interview is a good example of that, that she was looking for fairly common words. She had difficulty describing the event and using words to describe either body parts or what happened. And that's exactly the reason why I think it's admissible. And under [Evidence Code section] 352 analysis, given the elements and the nature of the things this jury will need to decide, I think the probative value outweighs the prejudicial value."

B. Relevant Authority

Evidence Code section 352 provides that a trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will: (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." It is well settled that "[u]nder Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant argues that Doe's statement to Delacruz, Bragg, and Salguero "were of limited probative value because they were relayed to the jury second-hand." Not so. The statements were highly probative of Doe's ability to understand what transpired and her capacity to consent to the sexual activity. Several of Doe's statements, including her fear

that she might "be pregnant," that she was "dancing" with defendant one night but could not recall which night, that the sex act ended because she "might've walked away," and that she could not recall which room she was in when the incident took place, are clearly relevant to her level of cognitive functioning at the time of the charged offenses. These statements were contemporaneous with Doe's audiotaped interview, the admission of which defendant does not challenge on appeal, and they corroborate much of that interview. It is not hard to see why the trial court found Doe's statements to be "some of the best evidence" of her intellectual function.

Defendant argues nonetheless that the statements are unduly prejudicial and should have been excluded because they collectively "revealed that [defendant] had forcibly raped Doe." Again, we disagree.

The exclusion of evidence under Evidence Code section 352 is not designed to avoid the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "Prejudice" in the context of this statute "is not synonymous with 'damaging': it refers to evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.) Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him in a bad light. (*People v. Robinson* (2005) 37 Cal.4th 592, 632.) Rather, undue prejudice is that which " 'uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' " (*Ibid.*, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 134.) " ' "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

We cannot conclude that the trial court's balancing analysis under Evidence Code section 352 was a clear abuse of discretion. As discussed, Doe's statements were highly

probative. And while the statements were damaging to defendant's case, the record does not disclose that the evidence was of such nature as to inflame the passions of the jury. The court carefully weighed the evidence, admitting statements that illuminated Doe's cognitive abilities and excluding statements that did not bear on the issue at hand. The jury was repeatedly admonished that it should not consider the statements for the truth of the matters asserted but to evaluate Doe's capacity to consent. The jury was also properly instructed not to be influenced by passion, sympathy, or prejudice. Jurors are presumed to understand and follow instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) We conclude the trial court acted well within its discretion in finding that the probative value of the evidence outweighed any undue prejudice.

Even assuming arguendo the evidence was erroneously admitted, we conclude any error was harmless. Review of a trial court's exercise of discretion under Evidence Code section 352 is based on the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Alcala* (1992) 4 Cal.4th 742, 790–791.) The trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson*, at p. 836.) Here, defendant fails to meet his burden of showing a reasonable probability he would have obtained a more favorable result in this matter absent the assumed evidentiary errors. The audiotaped interview and other admissible evidence amply support the jury's verdict. We are satisfied that even without the disputed statements the jury would have reached the same result.

Defendant finally argues he was denied his federal and state constitutional right to confront witnesses against him. "[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Testimonial hearsay involves "statements about a completed crime, made to an investigating officer by a nontestifying witness, . . . unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*People v. Sanchez* (2016) 63 Cal.4th 665, 694.)

Defendant's claim of constitutional error is unavailing. Much of the challenged evidence was nontestimonial as it was made to caretakers, not investigating officers. As for Doe's statements to law enforcement investigators, the record shows the evidence was admitted for the *nonhearsay* purpose of evaluating Doe's cognitive functioning. (See *Cage*, at p. 975, fn. 6 ["there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes"]; *Crawford v. Washington* (2004) 541 U.S. 36, 59–60, fn. 9 [the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"].) The jury was repeatedly admonished not to consider Doe's statements for the truth of the matters asserted. We find no error of a constitutional dimension.

DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Banke, J.